IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM GEORGE DECK, *Appellant,*	
vs.	No. 22,420
UNITED STATES OF AMERICA, *Appellee.*	

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

EDWARD E. DAVIS
United States Attorney
For the District of Arizona

JO ANN D. DIAMOS
Assistant United States Attorney
Attorneys for Appellee

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I.

JURISDICTIONAL STATEMENT OF FACTS

The Government accepts and adopts the Jurisdictional Statement of Facts of Appellant with the following addition: At trial Appellant had retained counsel, who was appointed for the appeal under the Federal Criminal Justice Act (18 U.S.C.A., §3006A).

(Hereinafter the Transcript of the Record, Volume I will be referred to as "RC"; the Reporter's Transcript of the testimony at trial will be referred to as "RT," the number following will refer to the page, and the number following "L" will refer to the line; the Appellant will be referred to as "Deck" or "Appellant.")

II.

STATEMENT OF FACTS

(The Government accepts and adopts the Appellant's Statement of Facts but is repeating hereinafter in order to add citations and to correct his citations to the transcript and to expand, somewhat, the evidence received at trial. The citations given by Appellant at the beginning were of a hearing out of the presence of the jury.)

On January 8, 1967, at approximately 4:30 in the afternoon, Appellant and another crossed from Mexico into the United States at the Grand Avenue Port of Entry in Nogales, Arizona (RT 10, L 4-18). At that time, Appellant was a passenger in a car driven by Louis Ralph Montano who was directed to a secondary station at the Point of Entry because it appeared that the Appellant and the driver of the vehicle had come from Mazatlan, i.e., the interior of Mexico (RT 10, L 4-18; 23-24). Roger Walker, a customs inspector on duty at the time at the secondary inspection area of the Nogales Port of Entry, discovered a sack filled with vegetable matter in the back part of the car being driven by Louis Ralph Montano (RT 23-24; 27-28). On Deck's person was found a pack of cigarette papers (RT 39, L 14-23). Also found on Deck were two orange tablets (RT 40). A short time thereafter certain capsules or tablets were found within the same automobile (RT 40, L 9-22). The vegetable substance found in the bag and on the cigarette papers was later identified by

Miss Roselyn Ereneta, a chemist employed by the custom services, as being marijuana and the tablets or capsules as amphetamine (RT 59-61). The substances identified as marijuana in the bag and in the cigarette papers and amphetamine in the arm rest and on Deck were obtained from the vehicle in question without a search warrant. (See RC that no search warrant is in the record.) Deck was not driving the vehicle in question. The Court admitted a statement made by him to Roger Walker to the effect that "the stuff we are bringing is a lot better for you than the stuff you are smoking" (RT 29-30). This statement was admitted by the Trial Court after a hearing out of the presence of the jury (RT 12-22) and with a cautionary instruction to the jury at the time of its receipt into evidence (RT 30, L 4-22).

III.

OPPOSITION TO SPECIFICATION OF ERRORS

1. The Trial Court did not err in denying Appellant's Motion to Suppress.

2. The Trial Court did not err in denying Appellant's Motion to Order Government witnesses to make disclosure to Appellant.

3. The Trial Court did not err in refusing Appellant's requested instruction number 1.

4. The Trial Court did not err in admitting the statement made by Appellant.

5. The Trial Court did not err in admitting the cigarette (Zig-Zag) papers containing the tiny leaf fragments of marijuana.

6. The Trial Court did not err in denying a motion for judgment of acquittal.

IV.

SUMMARY OF ARGUMENT

1. A search of a vehicle at a port-of-entry whose occupants stated they came from Mazatlan, Mexico, i.e., the interior of Mexico, was a border search.

2. The Motion to Order Government Witnesses to Make Disclosure was linked to a Motion to Continue Trial and was properly refused in view of the Government's Response in its Opposition to the Motions.

3. There is no basis in law for Defendant's Requested Instruction Number 1.

4. The statement of the Appellant was made after being placed under arrest, and advised as to his rights, and was not made in response to any question.

5. The reliability of the identification of marijuana leaf fragments in the cigarette (Zig-Zag) papers by the Government's chemist was for the jury, and the weight to be given this evidence was for the jury.

6. There was more than sufficient evidence to submit the case to the jury.

V.

ARGUMENT

1. A search of a vehicle at a port-of-entry whose occupants stated they came from Mazatlan, Mexico, i.e., the interior of Mexico, was a border search.

The Motion to Suppress was submitted on stipulated facts, but as was brought out by stipulation at trial, Edmund Eccleston who saw the car Appellant was riding in approach the port-of-entry from Mexico:

"A I asked them their citizenship and asked them where they were coming from and asked them if they brought any merchandise with them from Mexico.

"Q What was answered by Mr. Montano?

"A Both declared to be U.S. citilens and they were coming from Mazatlan and were bringing no merchandise at all.

"Q What did you do?

"A Well, they were coming from Mexico, the interior, which is south of the town of Nogales, Sonora, we refer all cars to secondary inspection coming from the interior. So then I informed them to go to the secondary for further inspection and announced on the public address system that the car, told them it was coming down, which we do with all cars coming from the interior.

"Q Do you have a code or signal for that?

"A Yes, we do.

"Q What is it?

"A A car coming from the interior is called 101.

"Q Did Mr. Montano say anything after you told him he was going to secondary?

"MR. HIRSH: Pardon me. Let me again object to this on the grounds of insufficient foundation by the Government for any statements by this defendant.

"THE COURT: No. This is merely on his entry into the United States. The objection is overruled.

"A Mr. Montano wanted to continue on, he had trouble with the transmission of his car and didn't want to stop because he was afraid he couldn't get his car going again. I told him he would have to go on down, that it was for further inspection.

"Q (By Miss Diamos) And did they drive toward secondary?

"A Yes, they did." (RT 10, L 4-23)

When the car's luggage was searched in secondary, the Inspector noticed a space between the rear seat and the luggage compartment; he jabbed at it and there was resistance. He pulled the divider inside and felt a bag there (RT 26-27).

Appellant, citing from *Marsh v. United States,* (5th Cir., 1965 344 F.2d 317, at page 324 states: "Border searches are, of course, not exempt from the constitutional test of reasonableness."

The statuory basis for a border search is 19 U.S.C.A. 482. It is:

"482. SEARCH OF VEHICLES AND PERSON

"Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial. R.S. §3061."

The historical note gives the derivation of 19 U.S.C.A. 482 as Act, July 18, 1866 c. 201 §3, 14 Stat. 178.

The United States Supreme Court in *Boyd v. United States,* 116 U.S. 616, 29 L.Ed. 746, 6 Sup. Ct. 524, traced the history of the third section of Chapter 201. It stated that statutes

provided for seizure of forfeited goods and had been authorized for two centuries prior to the adoption of the U.S. Constitution and since the first statute passed by Congress to regulate the collection of duties contained provisions to this effect (Act of July 31, 1789, 1 Stat. at Large 29, 43, Chap. 5) was passed by the same Congress which proposed for adoption the first amendments to the Constitution, ". . . it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the (Fourth) Amendment," *Boyd v. United States,* supra, at page 623.

This Court in *Murgia vs. United States,* (9th Cir., 1960) 285 F.2d 14, at page 17, reiterated this principle. "(The) searches of persons entering the United States from a foreign country are in a separate category from searches generally** (and) 'are totally different things from a search for and seizure of a man's private books and papers***.'"

Thus the principle has long been recognized, in fact, from the inception of the Fourth and Fifth Amendments that border searches are in a separate category.

This Court in *Murgia vs. United States, supra,* quoted with approval from *Landau vs. United States Attorney for Southern District,* 2 Cir., 1936, 82 F.2d 285, which stated the broad effect of the border search rule. The court therein stated at page 286:

> "As early as 1799, the baggage of one entering the country was subject to inspection (1 Stat. 662). The necessity of enforcing the customs laws has always restricted the rights of privacy of those engaged in crossing the international boundary. See Carroll v. United States, 267, U.S. 132, 154, 45 S. Ct. 280, 69 L.Ed. 543, 39 A.L.R. 790. *Neither a warrant nor an arrest is needed to authorize a search in these circumstances.* In the instant case, there was no disturbance of the appellant, his residence, or his effects

after a completed entry. It was to these evils that the Fourth Amendment was directed. Boyd vs. United States, 116 U.S. 616, 6 S. Ct. 524, 29 L.Ed. 746. It has been said 'Whatever the casuistry of border cases, it is broadly a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him.' See United States v. Kirschenblatt, 16 F. (2d) 202, 203, 51 A.L.R. 416 (C.C.A.2). *Although inspection of the person and baggage upon entry may be carried so far, or be so conducted, as to constitute an unreasonable search,* it is clear that such is not this case." (emphasis supplied)

Clearly, then whether there is in fact an arrest or not, the test is reasonableness which is a strict test, to quote from *Blackford vs. United States* (9th Cir., 1957) 247 F.2d 745, at page 750:

"Thus, we must apply the test of reasonableness to the conduct of the officers in the case at bar. This is a stricter test that (sic.) that applied to state proceedings under the Due Process Clause of the Fourteenth Amendment in Rochin and Breithaupt. The test there is whether the alleged activity of law enforcement officers in obtaining the questioned evidence fell short of civilized standards of decency and fair play. There may be, we conceive, conduct which, while unreasonable, is not so unconscionable that it 'shocks the conscience' or 'offend[s] a sense of justice.' Rochin, 342 U.S. at page 172, 72 S.Ct. at page 208. On the other hand, if conduct is reasonable, it must perforce satisfy Due Process requirements. Accordingly, if the actions here questioned were reasonable, they did not constitute a violation of either the Fourth or Fifth Amendments."

Title 19 U.S.C.A., §1461, provides:

"All merchandise and baggage imported or brought in from any contiguous country, except as otherwise provided by law or by regulations of the Secretary of the Treasury, shall be unladen in the presence of and be inspected by a customs officer at the first port of entry at

which the same shall arrive; and such officer may require the owner, or his agent, or other person having charge or possession of any trunk, traveling bag, sack, valise, or other container, or of any closed vehicle, to open the same for inspection, or to furnish a key or other means for opening the same. June 17, 1930, c. 497, Title IV, §461, 46 Stat. 717."

Thus, when the Inspector found an unaccounted for space, and pressed the panel and found resistance, surely it cannot be argued that, when the Inspector put his arm into this space and found a sack, the search was unreasonable.

2. The motion to order Government witnesses to make disclosure was linked to a motion to continue trial and was properly refused in view of the Government's response in its opposition to the motions.

Appellant filed a "Motion for Continuance and Order Ordering Government's Witnesses to Make Disclosure to Defendants" two days before the second time a trial was scheduled. (RC Item 10)

As was stated by the Government in its response opposing the Motion to Continue:

"This Response of Government and Memorandum in Opposition to Defendants' Motion to Continue, by Edward E. Davis, United States Attorney for the District of Arizona, by Jo Ann D. Diamos, Assistant United States Attorney, is submitted in response to Defendants' Motion for Order directing Government's witnesses to talk to defense attorneys and for continuance of the trial date.

"The records of this case show that this case was set for trial March 28, 1967. Defense attorneys then requested a continuance and this case was then set for trial on September 14, 1967.

"Some eight months after their arraignment Defendants filed a Motion to Suppress. Now, some two days before

the date set for trial, again the Defendants are seeking a continuance. Counsel admit that Government's counsel made its file available to defense counsel. They not only had the probable list of Government witnesses, but a summary of their testimony. Now defense counsel seek an order compelling Government witnesses to talk to defense counsel. What the Court wishes to do—this aspect of the Motion lies in its sound discretion. However, it is respectfully submitted, the motion for continuance becomes an abuse by defendants' counsel. Another continuance would only weaken the Government's case by permitting the trial to be put off again.

"As the Court knows, the Motion to Suppress was submitted on stipulated facts, i.e., the two defendants sought entry into the United States from Mexico at the Grand Avenue Port of Entry, they were referred to the secondary inspection area because they stated they came from the Interior, and here the contraband was found. The facts therefore are relatively very simple.

"What defense counsel seek is to have the Government be compelled to lay its entire case before Defendants, to have the matter then tried at some unknown date in the future and then face the probable argument of how can Government witnesses recall facts so long after the event, i.e., January, 1967 to trial date.

"It is respectfully submitted, that in view of both defense counsels' previous trial experience in this Court, the Motion to Continue should be denied, and the Government prays the Court exercise its sound discretion in acting on the Motion to compel the Government's witnesses to talk to defense counsel." (RC Item 11)

The Court denied the Motion to Continue and Order Ordering Government's Witnesses to Make Disclosure was denied (RC Item 35, minute entry dated September 13).

As was expected, Appellant's Counsel on cross-examination of Roger Walker (RT 31-32) and of Everett Turner (RT 45-51) and of James B. Anderson (RT 42), tried to attack their specific recollection.

Appellant had the benefit of the Government's case report prior to trial and the Appellant had a list of the Government witnesses to which he is not entitled, and their Jenckes Statute Statements were made available well prior to trial, to which he was not entitled until the witness had testified, 18 U.S.C.A., §3500.

It is respectfully submitted that the Appellant was not entitled to such an order and there was no error in denying it.

3. There is no basis in law for Defendant's Requested Instruction Number 1.

Defendant's Requested Instruction Number One as set out on page 5 of Appellant's Opening Brief instructs the Government must prove a "psychotrophic offense." There is no basis in law for such an instruction.

Title 21 U.S.C.A. §176a provides in part:

> "As used in this section, the term 'marihuana' has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954."

Title 26 U.S.C.A., §4761, provides in part:

> "(2) Marihuana.—The term 'marihuana' *means all parts of the plant Cannabis sativa L., whether growing or not;* the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination." (emphasis supplied)

The Government chemist testified she examined the seeds and the leaves (RT 118 and 119, L 21 to 120, L 6).

It is respectfully submitted Defendant's Requested Instruction Number One was properly refused.

4. The statement of the Appellant was made after being placed under arrest and was advised as to his rights, and was not made in response to any question.

Appellant at pages 23 to 24 presumes to suggest the state of mind of the Trial Court, Chief Judge James A. Walsh.

He argues that the Court was distinguishing between confessions and admissions. Appellant's Counsel ignores the record.

A hearing, out of the presence of the jury before any testimony was offered, was held at the time of the first recess in order to not inconvenience the jury (RT 72, L 6-11).

The hearing consisted of the testimony of a Customs Inspector and a Customs Agent (RT 12-21). The Appellant did not offer testimony to controvert their testimony (RT 21, L 25 to 22, L 2).

Thus, the requirement of the Trial Court first ruling on the voluntariness of the statement was complied with. *Jackson v. Denno* (1964) 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed 2d 908.

Miranda v. Arizona (1966) 384 U.S. 436, 16 L.Ed 2d 694, 86 S.Ct. 1602, sets out the requirements for the Government to establish the voluntariness of an in custody *interrogation.*

In the instant case there was no interrogation. The Appellant had been placed under arrest for smuggling marijuana and was advised by Customs Agent Anderson that he did not have to make any statement, and those he did make could be used against him in Court, that they were entitled to the presence of an attorney right then and there, and that if he could not afford an attorney, the Government would hire one for him (RT 18, L 17 to 19, L 3). Agent Anderson then left with co-defendant Montano and Customs Inspector Roger Walker remained with Deck (RT 16, L 6-10).

Walker lit a filtered cigarette and Deck told him the statement: "The stuff we are bringing is a lot better for you than the stuff you are smoking." (RT 29, L 24 to 30, L 1)

The Court ruled:

"THE COURT: In the matter of the statement, the Court will permit the statement to be introduced on the basis, while the advice as to the legal rights is not too thorough, this appears to be not a statement as a result of any questioning; it's a voluntary statement. As I understand it, the witness testified that when he lit a cigarette, the defendant volunteered that statement; and it is clear that before that time, the defendant had been advised that he didn't have to make any statement, and that anything he did say could be used against him in court. So it will be admitted on that basis." (RT 22, L 6-15)

At the time of the reception of the statement before the jury (RT 29, L 24 to 30, L 1), the Court instructed the jury:

"THE COURT: Mr. Walker, wait a moment. Members of the jury, the witness has testified to a statement made by Mr. Deck, and the rule in all cases is that any admission or incriminatory statement which is claimed to have been made by an accused person outside of court is to be received with caution and weighed with great care; and I want to instruct you particularly, with reference to the statement, that you have the determination first as to whether or not you believe the statement was made by Mr. Deck, but even if you—of course, if you find that it wasn't made, you will just disregard the testimony. On the other hand, if you do find that the statement was made by Mr. Deck, as the witness has testified, then you must determine whether Mr. Deck made that statement voluntarily, that is knowing that he was not required to say anything and knowing that if he did say anything it could be used against him. Unless you find that it was made voluntarily—in other words, if it was made with knowledge that he did not have to say anything; and if he didn't make it with understanding, you can disregard the statement." (RT 30, L 4-24)

The Trial Court again during its instructions to the Jury at the close of all the evidence instructed them again, as follows:

> "All evidence relating to any admission or incriminatory statement claimed to have been made by the defendant outside court should be considered with caution and weighed with great care. I am going to repeat the admonition that I gave to you earlier with respect to the statement the witness Walker testified to, the statement of the defendant to the effect that what we have or what we have been bringing, or something similar, would be better for you than that, when the witness is lighting a cigarette. If you do not find that that statement was actually made by the defendant, of course, you will give it no consideration. On the other hand, if you find that the statement was made by the defendant as Mr. Walker testified, then you will consider whether the statement was voluntary, whether the defendant knew at the time he made the statement that he was not required to make any statement and if he did make it, it could be used against him. Unless you find it was so voluntary and unless you find he did know that he was not required to make any statement and knew that it could be used against him if he made it, you will disregard the statement." (RT 81, L 20 to 82, L 14)

It is respectfully submitted the Appellant Deck, having been warned not to make any statements and that if he did they could be used against him (as well as the right to any attorney, etc.), did make a statment not in response to any question and the statement was therefore voluntarily made.

5. The reliability of the identification of marijuana leaf fragments in the cigarette papers by the Government's chemist was for the jury and the weight to be given this evidence was for the jury.

Appellant at trial objected to the identification of the marijuana leaf fragments as being too small a sample. (RT 56, L 22 to 57, L 4) This was not argued on appeal and will

therefore not be argued. Suffice it to say, the Chemist identified it and gave her reasons for her opinion (RT 62, L 15 to 63, L 14).

He objected further that it was offered as evidence of misconduct. (RT 57, L 4-9)

Where Appellant got this notion is not apparent. It was offered as circumstantial evidence of knowledge and constructive possession of the marijuana.

On appeal, Appellant argues it was offered to show "that the Appellant smoked some marijuana when he was down in Mexico. The jury is then asked to speculate that if he smoked marijuana in Mexico, he probably also bought some." (Appellant's Opening Brief, p. 24, third full paragraph, third sentence.)

He then gets to the crux of his argument, that if these two items of evidence were excluded, the marijuana leaf fragments and the statement, this would be a passenger case, and thus not sufficient evidence for the Court to submit the matter to the jury.

It is respectfully submitted the testimony of the chemist on the marijuana leaf fragments in Government's Exhibit 6 was properly admitted.

6. There was more than sufficient evidence to submit the case to the jury.

Appellant cites *Arellanes v. United States* (9th Cir., 1962) 302 F.2d 603, in support of his position attacking the sufficiency of the evidence. Admittedly, without both of these items of evidence, the statement and the marijuana leaf fragments in the cigarette papers found in his pants pocket and the two pills found in his pants pocket (which appeared to be identical to one of the three types of amphetamine tablets found in the arm rest of the car), there would not have been

sufficient evidence. The car had California license plates (RT 10, L 14-15), and they both were coming from Mazatlan, thus there was some evidence of a joint venture.

However, the evidence was properly admitted. The two pills in his pants pocket, and the cigarette papers containing marijuana leaf fragments were circumstantial evidence of knowledge *and* constructive possessions.

It is respectfully submitted there was sufficient evidence to submit the case to the jury and upon which to find the Appellant guilty beyond a reasonable doubt.

VI.

CONCLUSION

The evidence was properly received and there was sufficient evidence upon which a jury could find Appellant guilty beyond a reasonable doubt.

Respectfully submitted,

Edward E. Davis
United States Attorney

Jo Ann D. Diamos
Assistant United States Attorney
Attorneys for Appellee

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.

Jo Ann D. Diamos
Assistant United States Attorney

Three copies of the Brief of Appellee mailed this 26th day of March, 1968, to:

Leslie J. Gilbertson
Suite 407, Tucson Title Bldg.
45 West Pennington
Tucson, Arizona
Attorney for Appellant Deck